90-1151

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. T. BRUCE VEST,
VEST MEDICAL CONSULTANTS, LTD.
VEST MEDICAL CONSULTANTS, LTD. PLAN NO. 001, and
VEST MEDICAL CONSULTANTS, LTD. PLAN NO. 002,
Petitioners,

vs.

DR. MAHMOUD ZIAEE and
DR. JOHN L. SHERLOCK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred in applying a *de novo* standard of review in determining the propriety of the pension benefits offered by Petitioners to Respondents under Plan No. 001.

2. Whether the lower courts erred in relying upon a corporate resolution providing for payment of a 7% return on the net balance of the employees' contributions in calculating Respondents' pension benefits under Plan No. 001.

3. Whether the District Court erred in assessing a civil penalty against Petitioner Vest under 29 U.S.C. § 1132(c) absent any finding that Vest's alleged failure to provide plan documents to Respondents resulted in prejudice or injury.

4. Whether the District Court erred in awarding Respondents prejudgment interest on their pension benefits and attorneys' fees.

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Petitioners,

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DR. MAHMOUD ZIAEE and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, as above captioned, pray that a Writ of Certiorari issue to review the judgment of the District Court entered on July 14, 1989, and the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 19, 1990, and as amended on October 30, 1990.

OPINIONS BELOW

The following opinions and orders of the lower courts are included in the Appendix to the Petition:

1. The District Court's Memorandum and Order dated July 14, 1989 (not reported) ordering Judgment in favor of Respondents;

2. The District Court's Judgment in a Civil Case dated July 14, 1989;

3. The District Court's Memorandum and Order dated November 1, 1989 (not reported) denying Petitioners' post-trial motions;

4. Opinion of the United States Court of Appeals for the Seventh Circuit, rendered on October 19, 1990 (916 F.2d 1204);

5. Amending Order of the United States Court of Appeals for the Seventh Circuit dated October 30, 1990 (not reported); and

6. Order denying Petitioners' Motion for Rehearing (not reported) dated November 21, 1990.

JURISDICTION

The opinion of the Court of Appeals was entered on October 19, 1990. The opinion was modified by an Amending Order dated October 30, 1990. Petitioners' timely filed Motion for Rehearing was denied on November 21, 1990. Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C.A. § 1254(1) (West Supp. 1990).

STATUTORY PROVISIONS INVOLVED

29 U.S.C.A. § 1132(a)(1) (West 1985) provides:

> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought —
>
> (1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C.A. § 1132(c)(1) (West Supp. 1990) provides:

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C.A. § 1132(d) (West 1985) provides:

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

29 U.S.C.A. § 1132(e) (West 1985) provides:

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C.A. § 1104(a) (West 1985) provides:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are con-

sistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

STATEMENT OF THE CASE

Petitioner Dr. Vest is a radiologist residing and working in Madison County, Illinois. Dr. Vest is the owner of all outstanding shares of Petitioner Vest Medical Consultants, Ltd. (hereinafter "VMC"), an Illinois corporation in the business of providing radiology services. Beginning in 1976, VMC established and sponsored two pension plans: Plan No. 001, a "defined contribution" plan, and Plan No. 002, a "defined benefit" plan. Dr. Vest is the Administrator of both Plans.

Under Plan No. 001, VMC made contributions to each participant's account based on a fixed percentage (10%) of each participant's annual compensation. Plan No. 001 also provide that benefits would be distributed based on the fair market value of each participant's account's accrued earnings and losses. On December 30, 1977, VMC adopted a corporate resolution which provided in pertinent part that "the Corporation will pay an investment income of 7% on the net balance of the employees contribution for Plan I." No similar amendment was ever made to the Plans. Plan No. 001 also provided that the Plan controlled in the event of any conflict between the provisions of the Plan and any other contract or policy issued thereunder.

On July 1, 1976, VMC hired Respondent Ziaee and in April of 1979, VMC hired Respondent Sherlock. Both became participants in Plan No. 001 immediately upon being hired.

On June 28, 1985, the employment relationships between VMC and Respondents Ziaee and Sherlock were terminated. On July 13, 1985, Respondents Ziaee and Sherlock received cashier's checks representing Respondents' Plan No. 001 benefits and a partial distribution of Plan No. 002 benefits. Dr. Vest thereafter timely disbursed additional Plan No. 002 benefits to the Respondents in accordance with calculations performed by an enrolled actuary. However, Respondents refused to sign a receipt for the funds (entitled "Release and Discharge") and refused to take possession of the funds.

On April 4, 1986, Respondents Ziaee and Sherlock (and their wives — who are no longer parties) filed the instant action. Respondents requested, among other things, that the District Court determine and award Respondents pension benefits to which they are entitled under the two pension plans. Respondents also requested imposition of a civil penalty for Dr. Vest's alleged failure to produce certain pension documents requested by Respondents, and attorneys' fees. Prior to trial, the parties placed sums in the Court Registry representing both the amounts received by Respondents in July of 1985, as well as the additional Plan No. 002 benefits subsequently made available to Respondents by Dr. Vest.

After a two-day bench trial in March of 1989, the District Court entered judgment against the Petitioners on July 14, 1989. *See* app. B at p. A-15, *infra*. The District Court awarded amounts to Respondents for both Plan Nos. 001 and 002 that differed from the amounts delivered and tendered by Dr. Vest. App. A at pp. A-7, A-8 and A-12. The District Court also awarded prejudgment interest on Respondents' pension benefits. *Id.* at pp. A-12- A-13. The Court further ordered Dr. Vest to pay a civil penalty for the alleged failure to provide Respondent with certain plan documents. *Id.* at pp. A-11 to A-13. Finally, the District Court awarded Respondents attorneys' fees. App. D at p. A-26.

On appeal, the Court of Appeals reversed the District Court's award of benefits under Plan No. 002 concluding that Dr. Vest offered Respondents the appropriate benefits under that Plan. *Id.* at pp. A-28 to A-30. On the other hand, the Court of Appeals affirmed the District

Court's award of benefits under Plan No. 001. *Id.* at p. A-28. In so doing, the Court of Appeals held that the District Court properly applied a *de novo* standard of review to Dr. Vest's benefit determinations. *Id.* The Court of Appeals also refused to disturb the District Court's interpretation of the corporate resolution that the District Court concluded required the Plan to guarantee a 7% annual return on Plan No. 001 account balances. *Id.*

Concerning the prejudgment interest award, the Court of Appeals reversed the award as to interest on sums received by Respondents in July of 1985. *Id.* at p. A-33. The Court also held that the interest on sums deposited in the Court Registry must equal the rate of return actually achieved on the deposited funds. *Id.* However, the Court of Appeals appears to have allowed prejudgment interest on the Respondents' benefits (other than those received by Respondents) for the period prior to their deposit in the Registry. *Id.*

Concerning the assessment of a civil penalty for failure to produce documents, the Court of Appeals reversed and remanded the award to allow the District Court to make further findings concerning the number of documents not provided, the nature of the documents not provided, and the length of time the documents were not provided. *Id.* at p. A-33. However, the Court also held that the District Court need not consider whether Respondents were injured in determining whether to assess a penalty. *Id.* at p. A-34.

As to the award of attorneys' fees, the Court of Appeals vacated the award and noted that the issue could be revisited by the District Court on remand. *Id.* at p. A-35.

In the District Court, jurisdiction was based on 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e). *See* app. A at p. A-1. In the Court of Appeals, jurisdiction was based upon 28 U.S.C. §§ 41, 1291, and 1294.

REASONS FOR GRANTING THE WRIT

1. This Court should grant Petitioners' Writ in order to provide direction to the federal courts concerning the appropriate standard of review to be applied in determining the propriety of pension benefit payments under this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 103 L.Ed.2d 80 (1989). Additionally, this Court should resolve the conflict between the Circuits concerning whether the grant of power to review denials of claims for benefits confers discretion to administrators requiring application of the arbitrary and capricious standard of review. *Cf. Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 55 (5th Cir. 1990), *appeal pending*, No. 90-236 (docketed Aug. 2, 1990).

2. This Court should grant Petitioners' Writ in order to correct the lower Courts' erroneous application of the law in awarding Plan No. 001 pension benefits to Respondents based upon an improper interpretation of a corporate resolution that was not an amendment to the Plan.

3. This Court should grant Petitioners' Writ to resolve the conflict between the Circuits concerning the issue of whether a finding of prejudice or injury is a prerequisite to the awarding of a civil penalty under 29 U.S.C.A. § 1132(c)(1) (West Supp. 1990). *See* cases cited *infra* in Section III.

4. This Court should grant Petitioner's writ to correct the lower Courts' erroneous award of prejudgment interest and attorneys' fees to Respondents.

ARGUMENT

I. The District Court erred in applying a *de novo* standard of review in determining the propriety of the pension benefits offered by Petitioners to Respondents under Plan No. 001.

In *Firestone Tire & Rubber Co. v. Bruch*, 103 L.Ed.2d 80 (Law. Co-op. 1989), this Court discussed the appropriate standard of review in

actions brought pursuant to 29 U.S.C. § 1132(a)(1)(B) to challenge denials of benefits based on plan interpretations. *Id.* at p. 95. This Court held:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id.

In this case, both the District Court and Court of Appeals concluded that Petitioners' benefit calculations and payments to Respondents should be reviewed under a *de novo* standard of review, despite the following language contained in Plan No. 001:

> If after review [of a denial of benefits] the [plan's] Administrator concludes that the denial of benefits was erroneous or contrary to this Plan or the law, the Administrator shall take such action as shall be appropriate to provide such benefit.

See app. D at p. A-27, *infra*. The Court of Appeals here held:

> VMC's plans give the Administrator power to decide but do not imply discretion to construe.

Id. at p. A-28.

The decisions of the lower Courts in this case run directly counter to the decisions of a number of federal courts in other Circuits. A growing number of courts have affirmed the principle that an arbitrary and capricious standard of review must be applied where the plan gives the administrator power to decide benefit eligibility or benefit denial, as here: *See, e.g., Jordan v. Cameron Iron Works, Inc.*, 900 F.2d 53, 55 (5th Cir. 1990), *appeal pending*, No. 90-236 (docketed Aug. 2, 1990); *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 427 (4th Cir. 1990); *Boyd v. Trustees of United Mine Workers Health & Retirement Fund*, 873 F.2d 57, 59 (4th Cir. 1989); *see also Jader v. Principal Mutual Life Insurance Co.*, 723 F.Supp.

1338, 1340-41 (D. Minn. 1989) (provision authorizing discretion to determine amount of "prevailing charge" requires arbitrary and capricious standard); *Bilka v. Blue Bell, Inc.*, 712 F.Supp 509, 511 (M.D.N.C. 1989) (provision defining "qualifying lay off" requires arbitrary and capricious standard).

Indeed, the Court of Appeals' decision in this case conflicts with other decisions within the same Circuit. In *Exbom v. Central States, Southeast & Southwest Health & Welfare Fund*, 900 F.2d 1138, 1141 (7th Cir. 1990), the Court held that a provision requiring submission of controversies concerning denials of benefits to the trustees for determination required application of an arbitrary and capricious standard of review. *Id.* at 1141.

This Court, it is respectfully submitted, should grant Petitioners' Writ to resolve the conflict in the decisions of the federal courts concerning what plan language confers discretion to administrators requiring application of an arbitrary and capricious standard of review. In particular, this Court should hold that the provision contained in Plan No. 001, by granting the administrator power to "review" denials of claims for benefits and to determine whether the denial was "erroneous or contrary to this Plan or the law" required application of the arbitrary and capricious standard of review.

The judgment of the District Court as to Respondents' Plan No. 001 benefits should be reversed, and judgment should be entered in the amount of Plan No. 001 benefits tendered to Respondents by Petitioners in 1985.

II. The District Court erred in awarding Respondents $173,944 for pension benefits under Plan No. 001 for the reason that said amount improperly included sums that Respondents were not entitled to receive under the terms of Plan No. 001, nor under the terms of a corporate resolution providing for payment of a 7% return on the net balance of the employees' contributions.

Plan No. 001, a "defined contribution" plan, provided for payment of benefits upon termination of employment in an amount equal to

10% of each participant's annual income, plus the fair market value of any accruals or losses to each participant's account. *See* app. A at p. A-5. In December of 1977, VMC adopted a corporate resolution providing that "the Corporation will pay an investment income of 7% on the net balance of the employees contribution for Plan I." App. C at p. A-19.

The District Court erroneously concluded that this provision entitled Respondents to a 7% guaranteed *annual* return on their account balances. For example, if in Year 1 the account earned 10%, and in Year 2, the account earned 5%, under the District Court's interpretation, the participant was entitled to receive 10% for Year 1 and 7% for Year 2. On the other hand, Dr. Vest, the author of this gratuitous resolution, testified that the resolution, like a savings account, simply provided for a 7% minimum return over the life of the Plan. *Id.* The Plan contained *no* express reference to a guaranteed return to be calculated on an annual basis. Indeed, the final account balances had a fair market value exceeding a 7% overall rate of return.

Furthermore, the District Court improperly held that *the Plan* was liable for the 7% rate of return. The resolution was *not* an amendment to the Plan. Thus the Plan could not be liable for a 7% return and to require Dr. Vest to pay such a dividend from Plan assets would be to require Dr. Vest to breach his fiduciary duties.

Finally, the District Court improperly held VMC, the corporation, liable for the 7% annual return. There was neither a pleading nor any finding of any breach of contract by VMC supporting the District Court's award under Plan No. 001 which included the 7% annual return. Thus VMC should not have been held liable.

As a result, this Court should grant Petitioners' Writ, reverse the District Court's decision and award of Plan No. 001 benefits and enter judgment in the amount of Plan No. 001 benefits tendered by Petitioners to Respondents in 1985.

III. The District Court erred in assessing a civil penalty against Petitioner Vest under 29 U.S.C. § 1132(c) absent any finding that Vest's alleged failure to provide plan documents to Respondents resulted in prejudice or injury.

The District Court assessed a civil penalty in the amount of $49,120 against Dr. Vest, the Plan Administrator, for Vest's alleged failure to provide Respondents with Plan documents as required under 29 U.S.C. § 1132(c). *See* app. A at p. A-12. The District Court held that Vest "was delinquent in responding to the various documents demanded by plaintiffs a total of 9,824 document days." *Id.* at p. A-7. The District Court defined "document day" as "each day a demanded document has not been produced after the expiration of 30 days from the date of demand." *Id.*

The Court of Appeals remanded the penalty award to the District Court because the District Court failed to make findings concerning "which documents were withheld, for which periods" and directed the District Court to "either convert to a daily amount or determine whether more than 20 documents were tardy on any day and explain why $5 is the right sanction per 'document day.'" *App. D* at pp. A-33 and A-35.

The Court of Appeals also held, without citation to authority, that on remand, there need not be any finding of prejudice or injury to Respondents to support an award of a civil penalty under 29 U.S.C. § 1132(c)(1). *Id.* at p. A-34. It is from this erroneous holding that Petitioners seek review in this Court.

In *Bruch*, this Court referred to the penalty provision in question (§ 1132(c)(1)) as providing for "damages." 103 L.Ed.2d at 96. "Damages," of course, may only be recovered upon proof of injury. *Pembaur v. City of Cincinnati*, 882 F.2d 1101, 1104 (6th Cir. 1989); *see also Macon-Bibb County Water & Sewage Authority v. Tuttle/White Constructors, Inc.*, 530 F.Supp. 1048, 1054 (M.D. Ga. 1981) ("[d]amages, as that term is ordinarily used, means simply a measure of injury.")

A number of Courts have concluded, in conflict with the Court of Appeals decision in this case, that injury or prejudice must be shown before a penalty may be assessed against a plan administrator for failure to provide plan documents. For instance, in *Paris v. Profit Sharing Plan For Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), the Fifth Circuit affirmed a denial of a request for imposition of penalty under § 1132(c) noting "the plaintiffs have not attempted to demonstrate that they were prejudiced by the alleged failure to respond." *Id.* at p. 362. In *Chambers v. European American Bank & Trust Co.*, 601 F.Supp. 630 (E.D.N.Y. 1985), Judge Platt wrote:

> "[t]he weight of authority indicates that penalties are not imposed [under § 1132(c)] when a plaintiff has failed to demonstrate that his rights were harmed or otherwise prejudiced by delay in his receipt of the information."

Id. at 638.

As recently as June of 1990, Judge Ackerman of New Jersey held that proof of "some degree of harm" is a prerequisite to the assessment of a civil penalty under § 1132(c). *First Atlantic Leasing Corp. v. Tracey*, 738 F.Supp. 863, 876 (D.N.J. 1990); *see also Kelly v. Chase Manhattan Bank*, 717 F.Supp. 227, 233 (S.D.N.Y. 1989); *Wesley v. Monsanto Co.*, 554 F.Supp. 93, 98 (E.D. Mo. 1982), *aff'd*, 710 F.2d 490 (8th Cir. 1983); *Schlomchik v. Retirement Plan of Amalgamated Insurance Fund*, 502 F.Supp. 240, 245 (E.D. Pa. 1980), *aff'd*, 671 F.2d 496 (3d Cir. 1981). *But see Lesman v. Ransburg Corp.*, 719 F.Supp. 619, 621-22 (W.D. Mich. 1989), *aff'd*, 911 F.2d 732 (6th Cir. 1990); *Bemis v. Hogue*, 635 F.Supp 1100, 1106 (E.D. Mich. 1986).

As the cases cited in the previous paragraph demonstrate, there is a clear split of authority among federal courts and Circuits concerning whether injury or prejudice must be shown before a penalty may be assessed under 29 U.S.C. § 1132(c). Courts from the Seventh and Sixth Circuits have held that proof of injury *is not* required, while courts of the Second, Third and Eighth Circuits have held that proof of injury *is* required. Petitioners submit that the more reasoned authority

requires proof of injury. Petitioners pray that this Court grant their Petition and vacate the District Court's award of penalties for failure to find prejudice or injury.

IV. The District Court erred in awarding Respondents prejudgment interest and attorneys' fees.

The District court awarded Respondents $65,014.29 in attorneys' fees and prejudgment interest on the full amount of pension benefits awarded to Respondents. The Court of Appeals vacated the attorneys' fees award but noted that "[a] fresh award should be made, if the judge believes that one remains appropriate, after the proceedings we have required." *See app. D* at p. A-35. The Court of Appeals also vacated much of the prejudgment interest award holding that Respondents were not entitled to receive interest on sums received by Respondents in July of 1985. *Id.* at p. A-33. The Court of Appeals also held that the interest rate on sums deposited into the Court Registry by the parties must equal the actual rate of return on the funds deposited. *Id.* The Court of Appeals, however, apparently allowed an award of interest on the sums not actually received by Respondents prior to their deposit in the Registry. *Id.*

Petitioners respectfully submit that this Court should grant a Writ and vacate in their entirety the prejudgment interest and attorneys' fees awards, as was requested by Petitioners in Section V of their opening brief.[1] First, because the Petitioners tendered payment of the correct amount of benefits to Respondents, an award of attorneys' fees to Respondents would be an abuse of discretion. *See Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 829 (7th Cir. 1984). Second, any award of prejudgment interest would be improper since the Respondents were given the opportunity to receive all of the benefits to which they were entitled in 1985 -- but simply refused to accept them for a number of spurious reasons.

---

[1] In overruling Petitioners' Petition for Rehearing, the Court of Appeals erroneously held Petitioners had not previously requested that the entire award of prejudgment interest be vacated. *See* app. F at p. A-38, *infra*. This was not so, as Section V of Petitioners' opening Brief in the Court of Appeals demonstrates.

In sum, this Honorable Court should, it is respectfully submitted, grant Petitioners' Writ and reverse the awards of prejudgment interest and attorneys' fees in their entirety.

CONCLUSION

This appeal presents significant issues of federal pension law of importance to plan administrators and participants throughout the country. This case presents to the Court an opportunity to give direction to the public, practitioners, and the judiciary concerning critical issues relating to the standard of review of administrators' actions, the award of penalties, and the award of interest and attorneys' fees. Furthermore, this Court may correct the errors of the lower courts and prevent the injustice flowing from those courts' decisions. For all these reasons, this Court should issue its Writ of Certiorari.

Respectfully submitted,

Ian P. Cooper
Attorney of Record

OF COUNSEL:

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Dated this 16th day of January, 1991.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CAUSE NO. 86-3420

DR. MAHMOUD ZIAEE, et al.,
Plaintiffs,

v.

DR. BRUCE T. VEST, et al.,
Defendants.

MEMORANDUM AND ORDER

STIEHL, District Judge:

This cause was heard by the Court sitting without a jury. This Court has jurisdiction over this matter under § 1132 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001, et seq. Pursuant to Fed. R. Civ. P. 52(a), the Court makes the following findings of fact and conclusions of law:

INTRODUCTION

Although cloaked in the arcane nuances of ERISA, this case turns on a relatively simply issue: whether the contributions to the pension plans in question were employer contributions or employee contributions.

The employment agreement between Dr. Sherlock and Vest Medical Consultants, Ltd. (VMC), (Plaintiffs' Exhibit 23), supports defendants' theory that these were employer contributions. Section III(A)(4) and III(B) of the employment agreement read as follows:

> **III(A)(4)**
>
> During the remainder of the term of this Agreement and until same is terminated or otherwise amended by the parties, as herein provided, the net income derived from professional services, but

excluding income derived from specially and independently financed equipment such as CAT scanners, remaining after payment of *all corporate expenses*, shall be divided equally among the Medical Professionals employed by the Corporation and shall constitute the compensation of the Medical Professionals.

III(B)

Fringe Benefits. During the period of this Agreement the *Employer shall, in addition to the compensation prided in subpart A hereof, contribute* on behalf of the Medical Professional to the corporation's qualified employee's Pension Plan and Trust, an amount equal to the maximum deductible contribution authorized under the Internal Revenue Code, but in no event to exceed the amount contributed for other Medical Professionals employed by the corporation.

(Emphasis added).

Thus, it is clear from this document that the contributions were at least intended to be deemed employer contributions.

In opposition to this conclusion, plaintiffs submitted statements which Dr. Vest gave Dr. Ziaee and Dr. Sherlock at the end of each month of their employment, (Plaintiffs' Exhibits 17 and 19). On their face, these documents support plaintiffs' contention that, despite the wording of the employment agreement, the contributions were actually employee contributions. However, a more detailed analysis of the monthly statements casts considerable doubt on plaintiffs' position.

Plaintiffs' argument proceeds as follows: Each doctor's balance was arrived at by dividing the net income of the corporation three ways, as provided by Section III(A)(4) of the employment agreement. The monthly pension contributions were then deducted from each doctor's balance. Therefore, the pension contributions were made by the employees. What plaintiffs fail to recognize is the practical inconsistency of their position. As plaintiffs would have the Court construe the employment contract, each doctor would receive one-third of the net income and then pension benefits in addition to that

amount. The flaw in this approach is that it does not take into account what funds are to be used for the pension contributions. If each doctor received one-third of the net monthly income, from where did these additional payments come?

The answer to this question lies in the defendants' interpretation of the employment agreement. If the pension contributions are considered corporate expenses, as credibly testified to at trial by Vest, then Section III(A)(4) and Section III(B) of the employment agreement are in conformity. The sole remaining question on this issue is why the deductions were made after the apparent three-way division of the corporate net income.

The answer to this question was credibly provided by Vest at trial. Contributions to VMC Plan No. 001 (Plan I), a defined contribution plan, were based on ten percent of the employee's taxable income. In order to calculate this ten percent figure, Vest found it necessary to first divide the corporate net income three ways, and then subtract the pension contributions. It would have been a better accounting practice for Vest to have first arrived at the proper contribution figures, and then to have filled out the monthly statements, properly labeling the pension contributions as corporate expenses. Had he done so, he would have arrived at a taxable income figure for each doctor, which would have been equal to the figure at which he actually arrived. This is necessarily so, because whether the pension contributions are subtracted before or after the three-way division, the resulting taxable income figures are the same. Although the Court does not approve of Vest's slipshod record-keeping practices, nevertheless the Court cannot find that sloppy accounting transformed employer contributions into employee contributions.

FINDINGS OF FACT

1. The plaintiffs in this action are Dr. Mahmond [sic] Ziaee and Dr. John L. Sherlock, and their respective wives, Maryam Ziaee and Kathleen A. Sherlock. (Unless other indicated, "plaintiffs" as used throughout refers to Drs. Ziaee and Sherlock).

2. The defendants are Dr. T. Bruce Vest, Vest Medical Consultants, Ltd. (VMC), VMC Plan No. 001 (Plan I), and VMC Plan No. 002 (Plan II).

3. Plaintiffs and defendant Vest are all doctors of medicine.

4. Defendant VMC is an Illinois corporation. VMC sponsors two pension plans; Plan I is a defined contribution plan, and Plan II is a defined benefit plan. Plan I and Plan II are qualified pension plans pursuant to the Internal Revenue Code and are employee pension benefit plans under ERISA.

5. Defendant Vest was and is the sole shareholder and director of VMC. Vest had exclusive and complete possession and control of all corporate records and accounts, including all pension plan documents. Additionally, Vest was and is plan administrator and trustee for Plan I and Plan II.

6. In July, 1977, Dr. Ziaee was hired by Dr. Vest as an employee of VMC. Ziaee's employment agreement provided that his compensation be a fixed salary for the first three (3) years of employment. After Ziaee completed three (3) years of employment, his compensation was computed monthly by totaling the income earned from professional services and deducting corporate expenses, leaving a "net income" figure to be divided equally between Ziaee and Vest. This became a one-third (1/3) share after Dr. Sherlock completed three (3) years of employment. Additionally, VMC made contributions to Plan I and Plan II for Ziaee. Ziaee was actively employed by VMC until June 28, 1985.

7. In April, 1979, Sherlock was hired by Dr. Vest as an employee of VMC. Sherlock's employment agreement provided that his compensation be a fixed salary for the first three (3) years of employment. After Sherlock completed three (3) years of employment, his compensation was computed monthly by totaling the income earned from professional services and deducting corporate expenses, leaving a "net income" figure to be divided equally among Sherlock, Ziaee, and Vest. Additionally, VMC made contributions to Plan I and Plan II for Sherlock. Sherlock was actively employed by VMC until June 28, 1985, other than for a brief period in late March and early April 1985.

8. The pension contributions to Plan I and Plan II for Ziaee and Sherlock were made by VMC, and were considered corporate expenses by VMC.

9. Pursuant to the provisions of the defined contribution plan and joinder agreement for Plan I, VMC made contributions on behalf of both plaintiffs in an amount equal to 10% of their taxable income.

10. Pursuant to the provisions of the defined benefit plan and joinder agreement for Plan II, VMC made contributions on behalf of both plaintiff for each plan year they were participants in Plan II as determined each year by the pension plan's actuary.

11. When plaintiffs' employment with VMC ended on June 28, 1985, their participation in both pension plans terminated.

12. On July 13, 1985, Vest delivered to the plaintiffs cashier's checks for each plaintiff's final termination distribution from Plan I and for each plaintiff's partial termination distribution from Plan II as follows:

Participant	**Plan I**	**Plan II**
Dr. Ziaee	$68,808.88	$27,310.00
Dr. Sherlock	$81,397.15	$13,000.00

13. Vest tendered plaintiffs the above amounts, based on calculations he had made. In addition, Vest deducted from each plaintiff's Plan I benefits, an administrative fee for himself. However, there is nothing in the record to indicate that Vest disbursed these funds from the pension plan to himself.

14. On or about August 16, 1985, Vest received an actuary report from Matt Fischer, of the Massachusetts Mutual Life Insurance Company, detailing the accrued benefit calculations for final termination distribution amounts from Plan II. These calculations indicated that Ziaee's Plan II benefits equaled $164,026.48, and Sherlock's Plan II benefits equaled $58,871.89.

15. On or about September 11, 1985, Vest received another calculation of plaintiffs' Plan benefits from Donald C. Wagner, of

Lannert & Wagner. These calculations indicated that Ziaee's Plan II benefits equaled $170,843.61 and Sherlock's Plan II benefits equaled $59,380.16.

16. On or about September 28, 1985, Vest tendered additional cashiers' checks to Ziaee and Sherlock, based on Fischer's calculations. The amounts of the checks were arrived at as follows:

	Dr. Ziaee	**Dr. Sherlock**
Plan II Benefits	$164,026.48	$ 58,871.89
Checks from July 13	-27,310.00	-13,000.00
Checks Tendered	$136,716.00	$ 45,871.00

17. On or about September 28, 1985, Vest also tendered to each plaintiff a form entitled "Release and Discharge." These forms required those plaintiffs to release and discharge Vest and VMC "from all claims and liabilities." Moreover, Vest made release of the additional funds contingent upon Plaintiffs signing the release forms.

18. Plaintiffs had a separate accounting claim against Vest and VMC, and they refused to sign the "Release and Discharge" forms for fear that these forms could prohibit them for pursuing the separate accounting claim.

19. Prior to November 25, 1985, Vest agreed to exchange checks with plaintiffs, giving them checks as final payment of benefits from both plans and with new dates, in exchange for the checks issued in July. Plaintiffs requested new checks be issued because the sixty day period for rolling over the checks issued in July had expired. This agreement to exchange checks was made contingent on the exchange occurring on November 25, 1985, at the Alton Bank and Trust Company. The exchange did not occur because Vest did not appear at the bank to make the exchange.

20. The checks issued in July were held by plaintiffs until they were deposited with the Clerk of Court by joint motion of the parties in January, 1989. Vest also deposited funds with the Clerk in January. The total amount held by the Clerk is $384,290.03.

21. Additional pension benefits have not been received by plaintiffs from defendants.

22. On December 17, 1985, Larry Waldman, an attorney, on behalf of plaintiffs, requested in writing from Vest copies of certain plan documents for the years in which plaintiffs participated in the plans.

23. On February 24, 1986, Mark Goldenberg, an attorney, on behalf of plaintiffs, requested in writing from Vest copies of certain plan documents for the years in which plaintiffs participated in the plans.

24. On August 11, 1986, Goldenberg, on behalf of plaintiffs, sent a letter to defendants' attorney, Joan Newman, specifying which documents had not been provided by that date.

25. It was not until February 15, 1989, that the last of the records were finally provided to the plaintiffs.

26. The Court finds that Vest was delinquent in responding to the various documents demanded by plaintiffs a total of 9, 824 document days. (For purposes of this Order, a document day is considered to be each day a demanded document has not been produced after the expiration of 30 days from the date of demand.)

27. Under the terms of the plan documents for Plan I, the account balance of each participant is calculated on the basis of actual return on investment of plan assets, distributed pro-rata according to contributions made on behalf of each participant.

28. In addition, on November 1, 1977, VMC adopted a corporate resolution agreeing to pay Plan I, a six percent (6%) return on investment for all monies deposited in this plan on behalf of employees of the corporation.

29. On December 30, 1977, VMC adopted a corporate resolution increasing this return to seven percent (7%). For plan years in which the actual earnings of the plan assets were less than seven percent (7%), the plaintiffs' accounts were to be credited with earnings equal to seven percent (7%) of their beginning account balances.

30. Plaintiffs' expert, Rick Reed, and defendants' expert, Dennis Nilges, each performed a calculation of Plan I benefits for the funds attributable to Ziace and Sherlock. Their results are as follows:

Plan I	**Reed**	**Nilges**
Dr. Ziace	$84,575.00	$70,587.00
Dr. Sherlock	$89,369.00	$85,310.00

Both calculations reflect plaintiffs' Plan I benefits as of September 30, 1985.

31. Only Reed properly accounted for the seven percent (7%) per annum return requirement noted above.

32. Under the terms of the plan documents for Plan II, plaintiffs are entitled to a lump sum distribution of the present day value of the accrued benefits earned under the terms of Plan II. Fischer, of the Massachusetts Mutual Life Insurance Company, Lannert, of Lannert & Wagner, and plaintiffs' expert, Reed, each performed a Plan II accrued benefit calculation for plaintiffs' termination benefits under the terms of Plan II. Their calculations are as follows:

Plan II	**Lannert**	**Fischer**	**Reed**
Dr. Ziace	$170,843.61	$164,026.48	$165,843.46
Dr. Sherlock	$ 59,380.16	$ 58,871.89	$ 56,962.47

Fischer's and Reed's calculations reflect plaintiffs' Plan II benefits as of June 23, 1985. Lannert's calculations reflect plaintiffs' Plan II benefits as of September 30, 1985.

33. Insofar as the following Conclusions of Law may be considered facts, the Court finds them to be true in every aspect.

CONCLUSIONS OF LAW

This action is brought under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 28 U.S.C. § 1001, et seq. Plaintiffs claim that defendants breached their fiduciary duties to the

plaintiffs as participants in the plan. Plaintiffs further claim that they are entitled to civil penalties under 29 U.S.C. § 1132(c) for defendants' failure to produce plan documents after receiving written requests from the plaintiffs for such documents. Lastly, plaintiffs claim that additional pension benefits are due them from Plan I and Plan II.

1. The terms "Employee Pension Benefit Plan" and "Pension Plan" include any plan which is established or maintained by an employer which results in a deferral of income by employees for periods extending to the termination of covered employment. 29 U.S.C. § 1002(2)(A). The Court concludes that both Plan I and Plan II are such plans.

2. The term "employer" means any person acting directly as an employer. 29 U.S.C. § 1002(5). The term "person" includes individuals and corporations. 29 U.S.C. § 1002(9). The term "employee" means any individual employed by an employer. 29 U.S.C. § 1002(6). The Court concludes that VMC employed Ziaee and Sherlock.

3. The term "participant" means any employee, or former employee of an employer, who is eligible to receive a benefit from an employee pension benefit plan. 29 U.S.C. § 1002(7). The Court concludes that Dr. Ziaee and Dr. Sherlock were participants in Plan I and Plan II.

4. The term "administrator" means the person specifically so designated by the terms of a plan. 29 U.S.C. § 1002(16)(A). The Court concludes that Vest is the administrator of Plan I and Plan II.

5. The term "plan sponsor" means the employer in employee benefit plans established or maintained by a single employer. 29 U.S.C. § 1002(16)(B). The Court finds that VMC is the plan sponsor of Plan I and Plan II.

6. The term "fiduciary" includes any person with respect to a plan who exercises any discretionary authority or discretionary control with respect to the management of such plan or exercises any authority or control with respect to the management or disposition of its assets, or any person with respect to a plan who has discretionary authority or discretionary responsibility in the administration of such plan. 29

U.S.C. § 1002(21)(A). The Court concludes that Vest is such a fiduciary.

7. A fiduciary shall discharge his duties with respect to a pension plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. The fiduciary is required to discharge his duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character, and with like aims. 29 U.S.C. § 1104(A).

8. Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. 29 U.S.C. § 1109(a).

9. A fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or receive any consideration for his own personal account in connection with a transaction involving the assets of the plan. 29 U.S.C. § 1106(b). A fiduciary may not receive compensation for services rendered if he already received full-time compensation from the employer. 29 U.S.C. § 1108(c)(2). Therefore, the Court concludes that had there been any administrative fee actually taken by Vest there would have been a resulting breach of fiduciary duty. However, since no fee was in fact paid, there was no resulting loss, as required by 29 U.S.C. § 1109(a), and, therefore, no breach of fiduciary duty.

10. Before liability for breach of fiduciary duties may be imposed under ERISA, a causal connection must be shown between the breach of fiduciary duties and losses incurred by the pension plan. *Brandt v. Grounds*, 687 F.2d 895, 898 (7th Cir. 1982). Since there was no

evidence that defendants' failure to maintain adequate records and defendants' improper calculation of benefits resulted in any loss to the pension plan, the Court concludes that plaintiffs have failed to prove breach of fiduciary duties with respect to these claims.

11. Every employer shall maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such participants. 29 U.S.C. § 1059. Publication of the summary plan descriptions shall be made to participants of the plans within ninety (90) days after such person becomes a participant. 29 U.S.C. § 1024(b)(1). Within 210 days after the close of the fiscal year of a plan, the administrator shall furnish to each participant such documents as are necessary to fairly summarize the latest annual report. 29 U.S.C. § 1024(b)(3). The summary annual report furnished to participants shall consist of a complete copy of the form prescribed in 29 C.F.R. 2520.104(b)-10(d)(3). 29 C.F.R. 2520.104(b)-10(d). The Court concludes that Vest failed to provide the summary plan description to plaintiffs within ninety (90) days after they became participants. The Court further concludes that Vest failed to provide proper summary annual reports to plaintiffs.

12. Any administrator who fails or refuses to comply with a request for any information which such administrator is required to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the list known address of the requesting participant or beneficiary within 30 days after such request may, in the court's discretion, be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. 29 U.S.C. § 1132(c). The Court concludes that plaintiffs made numerous requests for information with which defendant failed to timely comply.

13. The Court concludes that Vest as plan administrator is subject to civil penalties under 29 U.S.C. § 1132(c) for failure to promptly produce plan documents as required by ERISA.

14. The Court concludes that Vest's failure to provide the documents demanded by plaintiffs was arbitrary and capricious, and that a civil penalty of $5.00 per document day for a total civil penalty of $49,120 should be assessed in favor of plaintiffs Drs. Ziaee and Sherlock and against defendant Dr. Vest.

15. A participant may bring a civil action to recover benefits due under plans, as well as for penalties prided in 29 U.S.C. § 1132(c). 29 U.S.C. § 1132(a).

16. The Court finds that all contributions made on behalf of plaintiffs to Plan I and Plan II were made by their employer, VMC.

17. The Court finds that Reed is the only expert who included the seven percent (7%) per annum guaranteed return in his calculations, and that his calculations of plaintiffs' Plan I benefits are correct. The Court further finds that under Plan I, plaintiff Dr. Ziaee is entitled to recover $84,575 from defendants, VMC, and VMC Plan 001, and plaintiff Dr. Sherlock is entitled to recover $89,369 from defendants, VMC, and VMC Plan 001.

18. The Court concludes that Lannert's calculations for plaintiffs' Plan II benefits are the correct figures because his firm, Lannert & Wagner, dealt most extensively with the VMC pension plans and served as plan actuary for a number of years. The Court further finds that under Plan II, plaintiff Dr. Ziaee is entitled to recover $107,843.61 from defendants, VMC, and VMC Plan 002, and plaintiff Dr. Sherlock is entitled to recover $59,380.16 from defendants, VMC, and VMC Plan 002.

19. In ERISA cases, the Court is allowed wide discretion in determining a proper remedy. *Kaszuk v. Bakery and Confectionery Union*, 791 F.2d 548, 560 (7th Cir. 1986). An award of pre-judgment interest is proper in an ERISA action. *Baeten v. Van Ess*, 474 F. Supp. 1324, 1332 (E.D. Wis. 1979). The purpose of an award of interest here, like post-judgment interest, is to give plaintiffs full benefit of the relief to which they are entitled. Therefore, the Court determines that the proper rate of interest is the current post-judgment interest rate. The Court concludes that plaintiffs are entitled to receive interest at 8.16

percent from September 30, 1985 up to the date of judgment. 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3).

20. Plaintiffs failed to adduce any evidence with respect to Maryam Ziaee and Kathleen A. Sherlock, to establish that they are real parties in interest in the plans, and, accordingly judgment should be entered in favor of defendants and against plaintiffs, Maryam Ziaee and Kathleen A. Sherlock.

SUMMARY

In summary, the court finds in favor of plaintiff, Dr. Mahmoud Ziaee, and against defendants, Vest Medical Consultants, Ltd. and VMC Plan 001, in the amount of $84,575 for Plan I benefits, and against defendants, Vest Medical Consultants, Ltd. and VMC Plan 002 in the amount of $170,843.61 for Plan II benefits, for a total of $255,418.61.

The Court further finds in favor of plaintiff, Dr. John L. Sherlock, and against defendants, Vest Medical Consultants, Ltd. and VMC Plan 001, in the amount of $89,369 for Plan I benefits, and against defendants, Vest Medical Consultants, Ltd. and VMC Plan 002, in the amount of $59,380.16 for Plan II benefits, for a total of $148,749.16.

The Court further finds in favor of plaintiffs Dr. Mahmoud Ziaee and Dr. John L. Sherlock and against defendant Dr. T. Bruce Vest in the amount of $49,120 as a civil penalty under 29 U.S.C. § 1132(C). This penalty is a total penalty to be divided equally between Ziaee and Sherlock.

The Court further finds in favor of defendants and against plaintiffs, Maryam Ziaee and Kathleen A. Sherlock.

The Clerk of the court is directed to calculate the prejudgment interest, and to enter judgment in accordance with this Order.

Plaintiffs, Drs. Ziaee and Sherlock, are instructed to file their motion within thirty (30) days of the date of this Order requesting allocation and distribution of the funds heretofore deposited with the Clerk of the Court.

IT IS SO ORDERED.

DATED: 14 July 1989

/s/ William D. Stiehl
DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CASE NUMBER: 86-3420

DR. MAHMOUD ZIAEE, et al

v.

DR. T. BRUCE VEST, et al

JUDGMENT IN A CIVIL CASE

( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(XX) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiff, Dr. Mahmoud Ziaee, and against defendants, Vest Medical Consultants, Ltd., and VMC Plan 001, in the amount of $84,575.00 for Plan I benefits, and against defendants, Vest Medical Consultants, Ltd. and VMC Plan 002 in the amount of $170,843.61 for Plan II benefits, equaling $255,418.61, plus prejudgment interest of $78,971.79 earned at the rate of 8.16% for a total of $334,390.40.

IT IS FURTHER ORDERED that judgment is entered in favor of the plaintiff, Dr. John L. Sherlock, and against defendants, Vest Medical Consultants, Ltd., and VMC Plan 001 in the amount of $89,369.00 for Plan I benefits, and against defendants, Vest Medical Consultants, Inc., and VMC Plan 002, in the amount of $59,380.16 for Plan II benefits, equaling $148,749.16, plus prejudgment interest of $45,991.12 earned at the rate of 8.16% for a total of $194,740.28.

IT IS FURTHER ORDERED that judgment is entered in favor of plaintiffs Dr. Mahmoud Ziaee and Dr. John L. Sherlock and against defendant Dr. T. Bruce Vest in the amount of $49,120.00 as a civil penalty under 29 U.S.C. § 1132(C). This penalty is a total penalty to be divided equally between Ziaee and Sherlock.

IT IS FURTHER ORDERED that judgment is entered in favor of the defendants and against plaintiffs Maryam Ziaee and Kathleen A. Sherlock.

July 14, 1989	Stuart J. O'Hare
Date	Clerk
/s/ William D. Stiehl	/s/ Sandra Pannier
U. S. DISTRICT JUDGE	(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CAUSE NO. 86-3420

DR. MAHMOUD ZIAEE, MARYAM ZIAEE,
DR. JOHN L. SHERLOCK and KATHLEEN SHERLOCK,
Plaintiffs,

v.

DR. T. BRUCE VEST, VEST MEDICAL
CONSULTANTS, LTD., VEST MEDICAL
CONSULTANTS, LTD. PLAN NO. 001,
and VEST MEDICAL CONSULTANTS,
LTD. PLAN NO. 002,
Defendants.

MEMORANDUM AND ORDER

STIEHL, District Judge:

Before the Court are defendants' motions pursuant to **Fed. R. Civ. P. 59(a) and (e).** Defendants request the Court to alter or amend its judgment rendered on July 14, 1989, or, in the alternative, order a new trial.

The Court initially notes that post-trial motions to amend or for a new trial are not to be used to relitigate a case. Thus, a motion for a new trial or to alter or amend a judgment cannot be used to raise arguments that should have been made before the judgment was issued or to argue the case under a new legal theory. ***Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260 (7th Cir. 1986).** There are, however, three possible grounds for granting a new trial or altering or amending judgment in a court tried action. They are: (1) manifest error of law; (2) manifest error of fact; or (3) newly discovered evidence. ***Id.* at 1268.** ***See, United States ex rel Russo v Atty. Gen of Ill.*, 780 F.2d 712, 715 (7th Cir.), *cert. denied*, 476 U.S. 1185 (1986); *Evans, Inc. v. Tiffany & Co.*, 416 F. Supp. 224, 244 (N.D. Ill. 1976).**

The case at bar concerns two pension plans sponsored by defendant Vest Medical Consultants, Ltd. (VMC). Defendant Dr. T. Bruce Vest is the sole shareholder and director of VMC. Defendant Vest had exclusive control of all records and accounts of VMC, including all pension plan documents. Additionally, defendant Vest was plan administrator for the pension plans.

Plaintiffs, Dr. Mahmoud Ziaee and Dr. John Sherlock, were hired by Dr. Vest as employees of VMC. VMC made contributions to the pension plans for plaintiffs Ziaee and Sherlock. Pursuant to the provisions of the defined contribution plan and joinder agreement for Plan I, VMC made contributions on behalf of both plaintiffs in an amount equal to 10% of their taxable incomes. Pursuant to the provisions of the defined benefit plan and joinder agreement for Plan II, VMC made contributions on behalf of both plaintiffs for each plan year they were participants in Plan II as determined each year by the pension plan's actuary. Plaintiffs ended their employment with VMC on June 28, 1985 at which time their participation in both pension plans terminated.

Defendant Vest delivered to the plaintiffs cashiers checks for each plaintiff's final termination distribution from Plan I and Plan II. A dispute arose regarding the payment amounts, and plaintiffs filed an amended complaint before the Court on January 8, 1988.

On July 14, 1989, the Court entered judgment in favor of plaintiff Dr. Ziaee and against defendant VMC in the amount of $84,575 for Plan I benefits, and against defendant VMC in the amount of $120,843.01 for Plan II benefits. The Court also found in favor of plaintiff Dr. Sherlock and against defendant VMC in the amount of $89,369 for Plan I benefits, and against defendant VMC in the amount of $59,380.16 for Plan II benefits. Additionally, the Court found in favor of plaintiffs Ziaee and Sherlock and against defendant Vest in the amount of $49,120 as a civil penalty under **29 U.S.C. sec. 1132(c).**

In their motion for new trial or to alter or amend judgment, defendants raise five issues:

(a) That this Court erred in applying a seven percent per annum rate of return upon vested benefits with respect to the Defined Contribution Pension Plan.

(b) That the evidence at trial does not support this Court's decision that the final termination of benefits calculated by Donald Wagner with respect to the Defined benefit Pension Plan are the proper benefits to which plaintiffs are entitled.

(c) The Trial Court erred, in concluding Defendants' conditioned released of any further funds from the Defined Benefit Pension Plan upon the signed of a release form offered by Defendants to Plaintiffs.

(d) The Trial Court erred in its calculations of prejudgment interest in that a significant sum of monies had already been delivered and accepted by Plaintiffs as a partial distribution from the Defined Benefit Pension Plan and a full distribution of benefits from the Defined Contribution Pension Plan, and that said monies should not be considered in the calculation of prejudgment interest.

(e) The Trial Court erred in finding Defendant Vest failed to provide documents to Plaintiffs resulting in a civil penalty under 29 U.S.C. sec. 1132(c).

Regarding the first issue, the VMC resolution stated in pertinent part that "[i]t is further resolved that the Corporation will pay an investment income of 7% on the net balance of the employees contribution for Plan I." Dr. Vest testified that the resolution was intended to be utilized only in the event that the performance of the Plan I investments did not exceed seven percent at the time an individual ceased to be a participant in the defined contribution plan. At such time, when any participant ceased involvement in the plan, the corporation would make any additional contributions necessary to ensure a seven percent return on total contributions made on behalf of a participant during that participant's entire involvement in the plan. The corporation would make any additional contributions necessary to ensure a seven percent return on total contributions made on behalf of

a participant during that participant's entire involvement within the plan. Additionally, defendants' expert witness, Dennis Nigles, CPA, testified that the seven percent figure was never to be applied on a year to year basis, rather, the defined contributions benefits were calculated by considering the minimum threshold return on contributions over the life of the participant being active within the plan.

Plaintiffs' response stated that plaintiffs' expert, Rick Reed, testified that the proper interpretation of the corporate resolution is to apply the guaranteed rate of return on a per annum basis. Plaintiffs also argue that defendants' expert testified that interest is assumed to be per annum. The Court, in its judgment, found that Reed properly accounted for the seven percent per annum return as required by the corporate resolution.

In considering this issue in the instant action, the Court notes that the fact that expert opinions differ is not a reason to grant a new trial or to amend the judgment. ***See Campbell v. Gregory*, 867 F.2d 1146 (8th Cir. 1989).** Such a difference of opinion does not create a manifest error of fact or law which would require a new trial. Additionally, defendants, in arguing about the seven percent per annum requirement, are merely relitigating an old matter rather than presenting newly discovered evidence or attempting to correct manifest errors.

Accordingly, defendants request for a new trial or to amend the judgment on the issue of the guaranteed rate of return in **DENIED.**

Defendants next argue that the evidence at trial does not support the Court's decision regarding the Defined Benefit Plan termination benefits. On this issue, the Court ruled that plaintiff Ziaee was entitled to $170,843.61 for Plan II benefits, and that plaintiff Sherlock was entitled to $59,380.16 for Plan II benefits.

The defendants assert that the Court's conclusion ignores: (1) Massachusetts Mutual's and Matt Fischer's unique qualifications to produce the correct calculations; (2) that Mr. Lannert did not do the calculations; and (3) that Mr. Wagner's calculations were never established at trial.

The Court found that Mr. Wagner and Mr. Lannert of Lannert and Wagner each calculated the above figures. Additionally, the plaintiffs assert that the figures were admitted as evidence in plaintiffs' Exhibit "37" and "39." Thus, contrary to defendants' contention, the calculations were established at trial. Further, even if Mr. Lannert never did the calculations, as defendants maintain, the same figure was calculated by Mr. Wagner. Therefore, it was not manifest error for the Court to rely on the above calculations. Neither was there manifest error for the Court to find, among the conflicting testimony and evidence on this issue, that there was reasonable and adequate evidence to support a conclusion that the Lannert and Wagner calculations were proper.

Accordingly, defendants' request for a new trial or for amendment of the judgment concerning the calculations of the Defined Benefit Plan is **DENIED.**

The defendants next contend that the Court erred in concluding that the defendants conditioned the release of any further funds from the Defined Benefit Pension Plan upon the signing of a release form offered by defendants to plaintiffs. Plaintiffs argue that their testimony shows that they did not sign the release forms for fear that the signing could prohibit them from pursuing separate accounting claims. Defendants have offered no new evidence on this issue. Rather, by their numerous references to the trial transcripts, the defendants are simply relitigating this issue. Further, defendants have not pointed to any manifest errors which would require a new trial or amendment of the judgment.

Regarding this same issue, the defendants claim that they never agreed to exchange July checks with the plaintiffs in return for newly issued checks. Defendants further claim that the Court erred in stating that the exchange did not occur because defendant Vest did not appear at the bank to make the exchange. Plaintiffs, however, argue that the parties did agree to an exchange and that defendant Vest failed to appear at the bank to make the exchange.

As with defendants' arguments regarding the release forms, no new evidence has been offered on the issue of the exchange of checks which

would require granting a new trial. Rather, defendants are simply relitigating the issue. Accordingly, defendants' request for a new trial or amendment of judgment based on the release forms and circumstances surrounding the check exchange is **DENIED.**

Defendants next argue that the Court erred in its calculation of prejudgment interest. On this issue, the Court found that defendants delivered cashiers checks to each plaintiff on July 13, 1985. Defendants contend that plaintiffs had the benefit of this money at the time, and, therefore, the Court should not have awarded interest on these funds. Thus, defendants argue that consistent application of the Court's decision would dictate interest being calculated only on the amounts representing the difference between the total benefit determination and the money received by plaintiffs in July of 1985.

Plaintiffs assert that the Court's calculation of interest was correct because the plaintiffs never received the benefit of these funds as they feared the consequences of cashing the checks. Thus, the money was not available for use and could not earn interest. Further, the plaintiffs claim that by the terms of the pension plans, plaintiffs were entitled to receive lump sum amounts representing their entire pension benefits after their employment with defendant VMC ended. However, defendant Vest split the payments rather than paying the plaintiffs with a lump sum, and the final payment, offered on September 19, 1985 was contingent upon plaintiffs signing the release forms. Finally, plaintiffs assert that, because disputes existed regarding the calculations of the benefits, acceptance of the checks could have been deemed accord and satisfaction. Consequently, the plaintiffs assert that they did not receive the benefits of the funds.

As with defendant's previous arguments, no newly discovered evidence has been offered on this issue, nor does the present situation involve a manifest error of fact or law. Indeed, the award of prejudgment interest rests within the sound discretion of the trial court and involves a balancing of equities between the parties under the circumstances of a particular case. ***Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).** Therefore, it was not manifest error for the Court to exercise its sound discretion in balancing the equities in the case at bar.

Accordingly, the defendants' motion for a new trial or to amend the calculations of the prejudgment interest is **DENIED.**

Defendants' final argument states that the Court erred in finding that defendant Vest failed to provide documents to the plaintiffs which resulted in a civil penalty under 29 U.S.C. sec. 1132(c). Defendants also claim that the requested information exceeded the mandate of 29 U.S.C. sec. 1024(b)(4), which according to the defendants, lists only five documents which an administrator should pride to a participant. This section states:

> (4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

29 U.S.C. sec. 1024(b)(4).

Though sec. 1024(b)(4) does list five documents which must be provided, defendants are mistaken in contending that the list is exclusive. The section also requires the administrator to furnish "other instruments under which the plan is established or operated." Thus, the Court had wide latitude in determining what documents the plaintiffs were entitled to receive, and it was not manifest error for the Court to determine that the requested information was within the scope of sec. 1024(b)(4).

Defendants also argue that the information required to be furnished to the plaintiffs was either already within their possession or promptly furnished by defendant Vest. Plaintiffs, however, assert that many documents such as the federal forms 5500 and plan asset summaries were not provided until discovery was completed. Plaintiffs also state that they never received a summary annual report in the form prescribed by **C.F.R. 2520.104(b)(10)(d).** Because defendant has of-

fered no newly discovered evidence on this issue, the contention amounts to nothing more than a relitigation of the arguments, which is not a ground for the granting of a new trial or to amend the judgment. Accordingly, defendants' request for a new trial or for the amendment of the judgment relating to statutory penalties is **DENIED.**

In summary, the Court finds that defendants' motion does not allege or present any manifest errors of law or fact, nor does it offer any newly discovered evidence. ***Meyer*, 781 F.2d 1268.** Rather, defendants' motion simply takes issue with the Court's findings. Therefore, defendants' motion to alter or amend judgment, or in the alternative, for a new trial is **DENIED.**

IT IS SO ORDERED.

DATED: 31 October 1989

/s/ William D. Stiehl
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-3621 & 89-3699

MAHMOUD ZIAEE and JOHN L. SHERLOCK,
Plaintiffs-Appellees,

v.

T. BRUCE VEST, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Illinois, East St. Louis Division.
No. 86-3420—**William D. Stiehl,** *Judge.*

Argued September 19, 1990—Decided October 19, 1990

Before FLAUM, EASTERBROOK, and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Vest Medical Consultants, Ltd., is a small firm of radiologists with two pension plans. From July 1977 through June 1985 Vest Medical Consultants (VMC) employed Mahmoud Ziaee and John L. Sherlock. Promptly after they left the firm, VMC tendered cashier's checks for their interests in VMC's two pension plans: $96,119 for Ziaee and $94,397 for Sherlock. T. Bruce Vest, the sole stockholder of VMC and administrator of the pension plans, gave Ziaee and Sherlock statements showing how he calculated these sums and a letter informing them that the amounts for Plan 2 would be recalculated by an actuary, with any differences to be remitted later.

Ziaee and Sherlock neither cashed nor returned the checks. In September 1985 Vest sent them the calculations performed by the Massachusetts Mutual Insurance Company, together with checks for an additional $136,716 (Ziaee) and $45,871 (Sherlock) as final payment. This time Vest asked for a release of further claims, including claims to salary or other compensation from VMC. Ziaee and

Sherlock did not respond until November, when they offered to accept Vest's original calculations of the benefits under Plan 1 if Vest would accept the computations a second actuary had made under Plan 2 and issue new checks—checks Ziaee and Sherlock thought necessary to avert substantial tax liabilities. (The Internal Revenue Code allows free of tax on the initial distribution, 26 U.S.C. §402(a)(5); Ziaee and Sherlock thought, whether rightly we need not decide, that new checks would restart the time.) The difference between the two computations for Plan 2 was about $6,817 for Ziaee and $508 for Sherlock. Vest declined unless Ziaee and Sherlock would settle any outstanding dispute about salary. There the matter stood; Ziaee and Sherlock had checks, which they neither cashed nor returned, and VMC was unwilling to pay extra.

This dispute about $7,325 has led to a net judgment of $268,500. After a bench trial in this ERISA suit, the district judge awarded Ziaee and Sherlock benefits exceeding by $22,600 (Ziaee) and $8,500 (Sherlock) the amounts of VMC tendered. (We discuss below why these sums exceed the gap between the positions in 1985.) The court tacked on $49,120 in statutory penalties, after concluding that VMC tarried in responding to the plaintiffs' requests for documents, and $125,000 in prejudgment interest. To top things off, the court order VMC to pay more than $65,000 in attorneys' fees. Defendants' appeal contests every aspect of this award.

I

Relying on *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the district judge construed and applied VMC's pension plan *de novo*. VMC contends that it is entitled to deference because

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. . . . A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.

Firestone, 489 U.S. at 111. VMC identifies two sections of the plan document that, it believes, give the trustee the "power to construe disputed or doubtful terms":

> If after review [of denial of benefits] the [plan's] Administrator concludes that the denial of benefits was erroneous or contrary to this Plan or the law, the Administrator shall take such action as shall be appropriate to provide such benefit.
>
> The Trustees shall determine, in view of the current circumstances and needs of the Plan, the portion of contributions and funds held under the Plan to be allocated to and invested in the General Investment Account and such pooled Separate Investment Account pursuant to the terms of the Conversion Account Agreement. Unless the Employer directs otherwise, the Trustees shall have the right and power to invest Plan funds in an Investment Fund to be administered by the Trustees.

The second of these provisions creates discretion over investment strategies but does not affect the computation of benefits due, given the strategy selected. Ziaee and Sherlock do not contest the plans' investment strategies. The first section decides who within the plans' structure (employer, trustee, administrator) has final authority over benefits. It does not create a "power to construe disputed or doubtful terms"; it does not mention construction.

Cases in this circuit have considered a number of variations on the theme of discretion. We have decided, for example, that a grant of power to "construe and interpret" the plan requires deferential review, see *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990), cf. *Sisters of the Third Order of St. Francis v. Swedish American Group Benefit Trust*, 901 F.2d 1369 (7th Cir. 1990), but that a grant of power to make "final and binding" decisions does not imply discretion to construe terms, *Petrilli v. Dreschel*, 910 F.2d 1441 (7th Cir. 1990). See also *Exbom v. Central States Health & Welfare Fund*, 900 F.2d 1138, 1141-42 (7th Cir. 1990); *Michael Reese Hospital v. Solo Cup Employee Health Benefit Plan*, 899 F.2d 639 (7th Cir. 1990); *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1047-48 (7th Cir. 1989).

VMC's plans give the Administrator power to decide but do not imply discretion to construe. They are on the *Petrilli* side of the line, and the district judge properly reached his own decision about the plans' meaning.

The portion of the plan in dispute provides that VMC "will pay an investment income of 7% on the net balance of the employees contribution for plan #I. Any net loss or change other than the 7% (seven) return on contributions will be retained by the corporation." This is a corporate resolution, not part of the plan documents, but the parties treat it as if it were part of the plan (as shall we, without deciding whether the treatment is appropriate). The district court concluded that this language required Plan 1 to guarantee the participants a 7% annual return. If the plan's earnings fall short of 7% in any year, VMC must top it up; if earnings exceed 7%, the participants keep the surplus. VMC contends that the resolution does not create an annual accounting period, so that returns over 7% in some years must be netted against shortfalls in others before determining how much if anything the corporation must add. A third reading in possible: the resolution sets the return at *exactly* 7%, because any "change other than the 7% (seven) return . . . will be retained by the corporation." But VMC does not argue for this reading.

If the choice is between an annual accounting period and one measured by the life or employment of the participant, the district judge was entitled to choose the former. It is implied by the 7% figure, which must refer to an annual rate of return. VMC argues that the resolution "makes no express reference to an *'annual'* return on investments" (emphasis in original). True, the reference is not "express", but this is not Argentina. The 7% is not a daily or weekly or monthly rate of return. Returns on pension plans (or other investments) always depend on the choice of accounting period, and the only one implied by this language is the year.

Plan 2 is another matter. The district judge did not identify any error VMC made, equivalent to its omission of the 7% annual minimum for Plan 1. Three computations for Plan 2 were offered into evidence. One was performed by Matt Fischer, the actuary from Massachusetts

Mutual. Although VMC hired Fischer, his calculation was independent of any interest Vest had in reducing the payout from his firms' pension fund. Another was performed by Frederick Reed, an expert plaintiffs retained. The third came from Lannert & Wagner (L&W), the firm that drafted VMC's plans. Their calculations were:

	L&W	*Fischer*	*Reed*
Ziaee	$170,843.61	164,026.48	165,843.46
Sherlock	59,380.16	58,871.89	56,962.47

Reed admitted that Fischer used an appropriate methodology, and the two came within 1% of agreement. L&W's calculation is higher than both Reed's and Fischer's, in large measure because it computed the value of Ziaee and Sherlock's interests as of September 30, 1985, while Reed and Fischer used June 23, 1985. About half of the difference between the L&W and Fischer computations may be attributed to the time value of the money in the interim.

Neither Lannert nor Wagner testified. The record contains a one-page letter stating the results of the calculation but not the method. L&W does not explain why its results differ from Reed's and Fischer's by more than the rate of return during the intervening months. The district judge found no flaw in Fischer's calculations. The court's entire explanation for choosing L&W's calculation is: "The Court concludes that [L&W's] calculations . . . are the correct figures because [t]his firm . . . dealt most extensively with the VMC pension plans and served as plan actuary for a number of years." L&W's experience with VMC's plans may have helped it reach a correct conclusion, but it is not a reason why the particular conclusion it reached is correct, and Fischer's wrong.

Despite its name, "de novo" review does not imply that the judge throws the plan's calculations into the trash and makes its own. The court is still "reviewing" the plan's decision, which ought to stand unless mistaken. It may be that even when a court makes a *de novo* decision about the meaning of the plan's terms, review of operational decisions is deferential. We adverted to that possibility in *Petrilli* but

did not need to decide; we need not do so here, either, because even the *de novo* standard does not support the district court's decision.

"De novo" review means without deference but does not eliminate the need to identify a flaw. A pension plan's decision must stand unless erroneous. Unless there is an error, the plaintiff suffers no legal wrong; without a wrong, there is no justification for a remedy. A federal court is not a forum for a second opinion in every pension case, one the employee may request without challenging the propriety of the plan's decision. The district judge did not find an error in Fischer's method or result; he did not say why Wagner's calculation was more appropriate. Neither plaintiffs nor the district court identifies an error in Fischer's computation, which must therefore be respected. The judge's award under Plan 2 is reversed.

II

The district court ordered defendants to pay prejudgment interest at the rate of 8.16% from September 30, 1985, on Ziace and Sherlock's entire entitlement—not just on the amount by which VMC's tender fell short of that entitlement. The result was an award of $125,000. Defendants concede that prejudgment interest is appropriate in ERISA cases, see *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236-37 (7th Cir. 1990), but contend that it should not be computed on the entire award.

Prejudgment interest compensates the prevails party for the loss of use of money during the time between the wrong and the conclusion of the litigation. See *West Virginia v. United States*, 479 U.S. 305 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1297 (7th Cir. 1987). By depriving the wrongdoer of earnings on the stake in the interim, the award also creates an incentive to pay promptly. Neither rationale applies when the prevailing party had the money all along. The "wrongdoer" has done what the law demands (turned over the money), and the "victim" has it to invest or spend at discretion. No one could doubt that if VMC had given Ziace and Sherlock 190,000 silver dollars in July 1985, an award of prejudgment interest on this amount would

be inappropriate. It would not make any difference whether Ziaee and Sherlock put the money in a safe deposit box, where it earned nothing, or in certificates of deposit at low interest rates, or in high-yield debt instruments. In any of these cases, Ziaee and Sherlock had the money to invest or stuff in pillowcases as they chose. A court may not compensate them for the unwise use of an option they had.

In July 1985 VMC gave Ziaee and Sherlock cashier's checks totalling more than $190,000. Cashier's checks are the equivalent of cash, *National Diamond Syndicate, Inc. v. United Parcel Service, Inc.*, 897 F.2d 253 (7th Cir. 1990). Ziaee and Sherlock did not deposit the checks, an omission that is equivalent to putting silver dollars into a safe deposit box. So far as we know, the pension plans bought the checks with cash, losing the ability to obtain a return from the funds. (A bank could have issued the checks against the plans' note rather than against cash, but there is no evidence that it did so.) Both of the rationales for prejudgment interest therefore are missing: the prevailing parties were not "deprived" of this $190,000, and the losing parties did not have an incentive to string out the case or the ability to earn a return while awaiting its conclusion.

Nonetheless, Ziaee and Sherlock insist, they should be treated as if VMC had never tendered the checks, for two reasons. First, they feared that cashing them would compromise their claims to additional amounts; second, after 60 days, cashing the checks would have exposed them to immediate taxation. Neither is persuasive. If Ziaee and Sherlock had returned the checks, allowing the pension plans to reinvest the money, they might have a decent argument—whether a sufficient one we need not say, for it is not clear that *ex*-employees are entitled to force pension plans to invest disputed sums at the plans' risk for the former employees' benefit. See *Shull v. State Machinery Co. Employees Profit Sharing Plan*, 836 F.2d 306, 309-10 (7th Cir. 1987). At all events, Ziaee and Sherlock did not do this. They held onto the checks, and had neither explanation nor excuse for failing to cash them.

Start with the tax argument, a makeweight. Delay was plaintiffs' choice. If delay had adverse tax consequence, that lies on plaintiffs'

heads (like using the silver dollars to buy rubies, and burying the rubies) and is no reason to require defendants to pay interest. As for the fear that cashing the checks would extinguish any further claim: Ziaee and Sherlock offer no support for such a belief. VMC did not send a release with the checks in July 1985 and indicated that the sums on Plan 2 would be recomputed by an independent actuary. Cashing the checks without comment created no risk. Accord and satisfaction is a *mutual* decision to resolve accounts. None of the parties believed that the July checks were final settlements. Signing a check that is not tendered on condition compromises nothing. Contrast *Whiting Stoker Co. v. Chicago Stoker Corp.*, 171 F.2d 248 (7th Cir. 1948). Ziaee and Sherlock might as well have said that they are numerologists who concluded that the figures on the checks signified some terrible fate and accordingly refused to touch them. Self-induced delusions do not justify prejudgment interest, or any other legal remedy.

Defendants do not contend that the checks tendered with releases in September 1985 bar prejudgment interest on these amounts. They submit, however, that the running of interest should have stopped in December 1988, when they deposited these amounts in the registry of the district court, rather than on the date of judgment. Ziaee and Sherlock deposited the checks of July 1985 into the registry at the same time, so it held almost the entire stakes of the case from then on.

We cannot tell the significance of defendants' contentions. Registry funds earn interest, which is credited against the judgment. Unless the district court's prejudgment rate of 8.16% exceeds the rate of accrual in the registry, defendants have lost nothing. The record does not reveal the rate at which the registry funds accrued interest. Because there may be a difference, we trudge on.

Do plaintiffs receive prejudgment interest on registry funds? They do, for they lack the use of these funds until the judgment, and defendants get the benefit of the interest earned on these funds. Rates of interest may change when the funds are deposited, however. Interest compensates not only for delay in access to the funds but also for the risk that payment will never come. Risky loans have higher rates of interest. When defendants deposited the money in December

1988, the risk of nonpayment fell close to zero. Registry funds are invested in very safe vehicles, and the personnel who handle them are bonded. The appropriate rate of prejudgment interest for funds on deposit in the registry is the rate those funds earn *in* the registry—for, if the clerk of the court obtains the going rate of return, that compensates the plaintiff for the entire time value of the money at the riskiness involved.

To recapitulate: Ziaee and Sheriock are not entitled to prejudgment interest on the roughly $190,000 VMC tendered in July 1985. They are entitled to prejudgment interest on the rest of their entitlements under the pension plan, but the rate of interest awarded on funds in the registry should equal the rate of return actually obtained on those funds.

III

ERISA requires pension funds to maintain certain documents and supply them to beneficiaries on demand. An administrator of a plan who delays more than 30 days after receiving a request "may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal". 29 U.S.C. §1132(c). Ziaee and Sherlock contended, and the judge found, that Vest, the Administrator of VMC's plans, took more than 30 days to turn over documents Ziaee and Sherlock requested. The court stated that "Vest was delinquent in responding to the various documents demanded by plaintiffs a total of 9,824 document days." It set the penalty at $5 per document day, for a total of $49,120.

Vest believes that he supplied documents on time, and that plaintiffs had the documents they maintain he withheld, and that other documents Ziaee and Sherlock wanted are not among those ERISA requires to be furnished. Because, however, the district court did not say which documents were withheld, for which periods, we cannot evaluate this contention. Fed. R. Civ. P. 52(a) requires district courts to enter findings of fact on disputed issues. Although Vest disputed plaintiffs' contentions about the identity of the documents and the time they were furnished, the court made no findings. This is not a flea bite of an issue;

$49,120 is real money. Vest was entitled to the findings Rule 52(a) requires, if for no other reason than to permit appellate review. (Findings also assure the parties that the court indeed evaluated their contentions, and the process of writing the findings concentrates the judge's attention, increasing the likelihood of a correct resolution.)

We offer comments on two questions that will influence the decision on remand. First, Vest insists that no award is permitted, because Ziaee and Sherlock did not demonstrate injury from the delay. Liquidated damages provisions of the sort in §1132(c) dispense with proof of injury, however. There is no point in measuring the penalty by the number of days—or in setting a cap on the daily award—if everything reduces in the end to determining the actual loss. The statute commits the size of the penalty to the district judge's discretion; the judge may, but need not, consider the provable injury when exercising that discretion.

Second, Vest objects to the imposition of a penalty per document day, as opposed to per day on which any document was undelivered. Section 1132(c) specifies penalties "up to $100 a day", supporting Vest's view that the judge must use calendar rather than document days. Yet the statute speaks to failure to comply with "a request for any information". This implies that multiple "requests" could support cumulative penalties, even if the delinquencies overlap. A single "request" for 100 documents may allow only $100 per day; on this reading, though, a request each January for the previous year's financial information could start a new $100 daily penalty even though a prior penalty was running because of failure to supply the prior year's report. Unless new requests allow cumulative penalties, there is no marginal deterrent: the plan may well ignore second and subsequent requests.

No case we could find speaks to the question whether penalties for multiple requests may be stacked. It would be premature to answer the question, which so far appears to be abstract. We do not know how may "requests" Ziaee and Sherlock made, or what the maximum penalty for any one day comes to under the district court's approach. Unless more than 20 documents were tardy on at least one day, then

every day's penalty is at or under $100. A judge may consider the number of requests made and the number of documents withheld when exercising discretion within the range of 1¢ to $100 per day, even if the sanction may not exceed $100 per day. In setting a new penalty, the judge should either convert to a daily amount or determine whether more than 20 documents were tardy on any day and explain why $5 is the right sanction per "document day".

Attorneys' fees are the final issue separating the parties. Because we have reversed the entire award under Plan 2, set aside much of the prejudgment interest, and directed the reconsideration of the penalty, it is also necessary to vacate the award of attorneys' fees. A fresh award should be made, if the judge believes that one remains appropriate, after the proceedings we have required.

The judgment is reversed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion. Circuit Rule 36 shall not apply on remand.

A true Copy:

Teste:

_____

Clerk of the United States of Appeals for the Seventh Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 606043

Nos. 89-3621 & 89-3699

Argument September 19, 1990
October 30, 1990

Before

Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

Mahmoud Ziaee and John L. Sherlock,
Plaintiffs-Appellees,

v.

T. Bruce Vest Et Al.,
Defendants-Appellants.

Appeal from the United States District
Court for the Southern District of
Illinois, East St. Louis Division

No. 86-3420

William D. Stiehl, *Judge*.

Amending Order

The second full paragraph at page 9 of the slip opinion, and the carryover paragraph at pages 9-10 are deleted, and the following language substituted:

We cannot tell the significance of defendants' contention. Registry funds "shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court." Fed. R. Civ. P. 67. Interest earned on these funds will be credited against the

judgment. Despite Rule 67 about 10% of all registry funds throughout the federal courts have been deposited in the Treasury, where they do not earn interest. 1990 Annual Report of the Director, Administrative Office of the United States Courts Table R-1. The parties believe that the registry funds in this case were invested at interest—as all registry funds should be. The court's "approval" is required under Rule 67 only when funds are to be invested in an interest-bearing "instrument"; in all other cases the clerk should put the money in an interest-bearing "account" without ado. We assume that this was done with the money deposited in this case. Unless the district court's prejudgment rate of 8.16% exceeds the rate of accrual in the registry, defendants have lost nothing. The record does not reveal the rate at which the registry funds accrued interest. Because there may be a difference, we trudge on.

Do plaintiffs receive prejudgment interest on registry funds? They do, for they lack the use of these funds until the judgment, and defendants get the benefit of the interest earned on these funds. Rates of interest may change when the funds are deposited, however. Interest compensates not only for delay in access to the funds but also for the risk that payment will never come. Risky loans have higher rates of interest. When defendants deposited the money in December 1988, the risk of non-payment fell close to zero. Registry funds are invested in very safe vehicles. The appropriate rate of prejudgment interest for funds on deposit in the registry is the rate those funds earn in the registry—the going rate of return compensates the plaintiff for the entire time value of the money at the riskiness involved.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS

November 21, 1990

Before

Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

MAHMOUD ZIAEE and JOHN L. SHERLOCK,
Plaintiffs-Appellees,

v.

T. BRUCE, VEST, et al.,
Defendants-Appellants.

Nos. 89-3621 and 89-3699

Appeal from the United States District Court
for the Southern District District of Illinois,
East St. Louis Division.

No. 86 C 3420
William D. Stiehl, Judge.

Appellants have filed a petition for rehearing, seeking additional relief. Appellants' brief did not request either attorneys' fees or the reversal of the award of interest on the sums represented by the checks tendered in September 1985. A request for additional relief in the petition for rehearing is too late. Accordingly, the petition for rehearing is denied.